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No.

In The

Supreme Court of the United States

October Term, 1995

CARLOS DÍAZ MATOS,

Petitioner,

v.

THE PEOPLE OF PUERTO RICO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether a local government may maintain in force for more than four decades a vague and overbroad breach-of-peace statute, that left to the discretion of law enforcement officials, prosecutors and judges to determine that the spoken words "son of a bitch" has became unprotected expression.

Whether a jury instruction framed on the language of such breach-of-peace statute not limited narrowly by construction to fighting words can sustain a guilty verdict.

PARTIES

1. The People of Puerto Rico, plaintiff-appellee in the court below.

2. Carlos Díaz Matos, defendant-appellant in the court below.

Mr. Carlos Díaz Matos was here the convicted person under the questioned breach-of-peace statute. He is an indigent person that the Society for Legal Assistance of Puerto Rico brought legal representation before the Supreme Court of the Commonwealth of Puerto Rico. He was sentenced to pay $250 fine plus the costs or to serve one day in jail for every $5 left unpaid.

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The judgment of the Supreme Court of the Commonwealth of Puerto Rico, not reported, was issued on November 10, 1995. A certified translation of this judgment appears in the Appendix I.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1258. The present petition is being filed within ninety days after the entry of the judgment. The judgment was issued on November 10, 1995 and the day of entry was on November 13, 1995. A Certificate of Translation of the Notice of Judgment appears in the Appendix III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,. . . . " A Certificate of Translation of the Notice of Judgment appears in the Appendix III.

Due Process of Law Clause, Fourteenth Amendment of the United States Constitution: "No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of liberty or property, without due process of law. . . . "

Section 260(a) of Puerto Rico Penal Code, Laws of Puerto Rico Annotated, 33 L.P.R.A. Sec. 4521 provides: "It

shall be punishable by imprisonment not exceeding six (6) months or a fine not exceeding five hundred dollars, or both, in the discretion of the Court for any person who wilfully performs any of the following acts: (a) disturbs the peace or quiet of any individual or neighborhood, by loud and unusual noises, tumultuous or offensive conduct, or threats, insults, fights, challenges or provocations. . . . "

STATEMENT OF THE CASE

Appellant and petitioner Carlos Díaz Matos was processed in the Superior Court of Puerto Rico, San Juan Part, of violating Section 2.8 of the Domestic Violence Act, *Laws of Puerto Rico Annotated*, Volume 8, Section 628, for use of violence and intimidation against public authority, aggravated battery and for breach of the peace. The events took place on August 17, 1991, at the Hato Rey East Police Station.

Petitioner was submitted to a jury trial. But the trial judge peremptorily acquitted him of the offenses of violence and intimidation against public authority and aggravated battery. The jury found him guilty of breach of the peace. On April 27, 1993, Díaz Matos was sentenced to pay a $250 fine plus the costs or to serve one day in jail for every $5 left unpaid.

At trial, the following witnesses testified for the prosecution: Raquel Rosado Osorio, the defendant's ex-wife; the injured party, police officer Juan Rosa Rodríguez; and sergeant Rafael Díaz, who investigated the complaint.

Police officer Rosa Rodríguez testified that on the day of the events, he was working the 6:00 p.m. to 2:00 a.m. shift. He stated that at 2:00 a.m., he was at the Investigations Division of the Judicial Center in Hato Rey filing another case when a lady arrived and asked him for help stating that her husband was upsetting her. At this moment, the defendant arrived and asked officer Rosa to help him. Rosa stated that he then cited for that same day during the evening at the Hato Rey East Police Station.

As soon as he arrived to the above-mentioned police station, he noticed that petitioner Díaz Matos had also arrived there. Petitioner told Rosa that he was going to report him to the on-duty sergeant. Immediately, Rosa prepared an official citation and asked the defendant to sign it; the latter refused, turned around, and headed for the station door. Rosa followed him with the intention of handing him the citation, when Díaz Matos "turned around, grabbed and crumpled the citation, and called him "son of a bitch" (the word he used in Spanish was *cabrón*, that may be translated as male goat, cuckold or bastard) and then slapped him in the face. Police officer Rosa added that he felt offended by this word because he is a married man. Then, Díaz Matos, was arrested. At the end of the trial, the jury found Carlos Díaz Matos guilty of breach of the peace.

Petitioner then appealed the guilty jury verdict, and the Puerto Rico Supreme Court affirmed the sentence from the Superior Court, San Juan part. And now we present this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Puerto Rico breach-of-peace statute, on its face and on its application, criminalizes a substantial amount of protected speech and conduct, effectively grants police an unconstitutionally repugnant discretion to make arrests selectively.

A. Such unconstitutional breach-of-peace statute is applied annually at least to five thousand citizens of the United States.

In this instant case the petitioner was arrested, processed and convicted because he told, in a verbal dispute, to a policeman, "you are a son of a bitch." The word that petitioner used in Spanish was *"cabrón"*, which in spanish this word has at least six different meanings.[1] This one could mean, for example, male goat, cuckold, bastard, bugger or pimp.[2]

Because the police officer believed that this word was prohibited, he arrested the petitioner for wilfully using opprobrious language or insults in violation of Section

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[1] See *Diccionario de la Lengua Española*, ("Dictionary of the Spanish Language") Real Academia Española, Editorial Espasa-Calpe, Madrid, page 640.

[2] *Simon and Schuster's International Dictionary*, English-Spanish/Spanish-English, New York, 1973, page 1005. See also *A New Pronouncing Dictionary of the Spanish and English Languages*, rev. ed., Meredith Publishing Company, New York, 1970, page 106; the word *"cabrón"*, means here, buck, he-goat, or one who consents to the adultery of his wife.

260(a) of Puerto Rico Penal Code. The language of the statute provides:[3]

> It shall be punishable by imprisonment not exceeding six (6) months or a fine not exceeding five hundred dollars, or both, in the discretion of the Court for any person who wilfully performs any of the following acts:
>
> (a) disturbs the peace or quiet of any individual or neighborhood, by loud and unusual noises, tumultuous or offensive conduct, or threats, insults, fights, challenges or provocations.

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[3] The full text of the Section 260 provides: "It shall be punishable by imprisonment not exceeding six (6) months or a fine not exceeding five hundred dollars, or both, in the discretion of the Court for any person who wilfully performs any of the following acts: (a) disturbs the peace or quiet of any individual or neighborhood, by loud and unusual noises, tumultuous or offensive conduct, or threats, insults, fights, challenges or provocations. (b) On any public street or throughfare fires any gun or pistol, or without it being a case of self-defense, draws or exhibits any deadly weapon in the presence of two or more persons, in a violent, rude or threatening attitude or unlawfully makes use of said weapon in a fight or quarrel. (c) Uses vulgar, profane or indecent language in the presence or within the hearing of women or children in a loud or noisy manner."

In *Cohen v. California*, 403 U.S. 15, 16, 29 L. Ed. 2d 284, 288, 91 S. Ct. 1780 (1971) a similar breach-of-peace statute was declared unconstitutional by this court. It was Section 415 of the California Penal Code, insofar as it is pertinent, provides: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise or by tumultuous or offensive conduct, or threatening traducing, quarreling, challenging to fight, or fighting, . . . , is guilty of misdemeanor . . . "

This statute is, on its face, unconstitutionally overbroad. **In the first place,** their terms not only seek to regulate spoken words (insults or insulting language or opprobrious language, and so on), but also conduct. And this Court has established repeatedly that not only pure speech is protected by the First and Fourteenth Amendments, but also vulgar and offensive speech. *Lewis v. City of New Orleans,* 415 U.S. 130, 134; 39 L. Ed. 2d 214, 219; 94 S. Ct. 970 (1974); *Gooding v. Wilson,* 405 U.S. 518, 522; 31 L. Ed. 2d 408, 414; 92 S. Ct. 1103 (1972); *Cohen v. California,* 403 U.S. 15; 29 L. Ed. 2d 284; 91 S. Ct. 1780 (1971); *Terminiello v. Chicago,* 337 U.S. 1, 4-5; 93 L. Ed. 1131; 69 S. Ct. 894 (1949). In *R. A. V. v. St. Paul,* 505 U.S. ___, 120 L. Ed. 2d 305, 317; 112 S. Ct. ___ (1992), this Court held:

> The First Amendment generally prevents government from proscribing speech, . . . , or even expresssive conduct, . . . , because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. . . . From 1791 to the present, however, our society, like other free civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that may be derived from them is clearly outweighed by the social interest in order and morality.' . . . We have recognized that 'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations. . . . (obscenity); . . . (defamation); . . . ("fighting words"); . . .

Secondly, Section 260(a) of Puerto Rico Penal Code that punished spoken words, has the unconstitutional defect that "was not limited in scope to fighting words

that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' ". *Houston v. Hill*, 482 U.S. 451, 461-462; 93 L. Ed. 2d 398, 412; 107 S. Ct. 2502 (1987); *Gooding v. Wilson*, supra, at 525; *Chaplinsky v. New Hampshire*, 315 U.S. 568; 86 L. Ed. 1031; 62 S. Ct. 766 (1942).

In the same line, the questioned statute is, on its face, unconstitutionally vague. About the vagueness doctrine it has been said:[4]

> Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision, and a vague law need not reach activity protected by the first amendment. As a matter of due process, a law is void on its face if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'. Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemmed conduct becomes a matter of guesswork. This indefiniteness runs afoul of due process concepts which require that persons be given fair notice of what to avoid, and that the discretion of law enforcement officials, with the attendant dangers of arbitrary and discriminatory enforcement, be limited by explicit legislative standards.

Therefore the test to be applied is that a law is void on its face if it is so vague that persons "of common

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[4] L.H. Tribe, *The Constitutional Protection of Individual Rights: Limits on Government Authority*, The Foundation Press, Inc., New York, 1978, page 718. (citation omitted).

intelligence must necessarily guess at its meaning differ as to its application".[5] In other words, the message that a provision wants to give, it is not clear. This is exactly the problem with Section 260(a). It is not clear, for example, what is "offensive conduct" or "tumultuous conduct" or "traducing" or "loud or unusual noise". In a state case the Puerto Rico Supreme Court concluded that the "act of peeping" constituted a violation of the breach-of-peace statute. *Ramos v. District Court*, 73 P.R.R. 399, 401 (1952).[6] Other case was *People v. Figueroa Navarro*, 104 P.R.R. 1016 (1976), in which the court indicated that "petitioner's behavior stalking the house, parking the vehicle in front of the same, starting insistently, using binoculars and a camera with telephoto lens, and photographing the girls," . . . constituted the offensive conduct proscribed by Section 260(a). Also the Puerto Rico Supreme Court has held that to say: "The police may go to hell, you bastards," is conduct at the core of the breach-of-peace statute. *People v. Caro González*, 110 P.R.R. 669, 670 (1980). However, in that case these words were said to the police by a person from the interior of his house, where "there was no physical contact with the policemen and they could not get into the house and appellant did not leave the same." Id.

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[5] *Grayned v. City of Rockford*, 408 U.S. 104, 107-108; 3 L. Ed. 2d 222, 227-228; 92 S. Ct. 2294 (1972).

[6] The court was more exigent and held that any " 'offensive' conduct which disturbs the 'peace or quiet' of a neighborhood or person is sufficient to be a breach of peace." *Ramos v. District Court*, supra, at 401.

Another problem with the Puerto Rico breach-of-peace statute is that it confers full discretion to make arrests in a selective way. This was a serious defect that this Court confronted with the Houston's ordinance in *Houston v. Hill*, 482 U.S. 451; 96 L. Ed. 2d 398; 107 S. Ct. 2502, supra. In *Houston*, at 462-463, the Court expressed:

> The Houston ordinance is much more sweeping than the municipal ordinance struck down in Lewis. It is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that "in any manner . . . interrupts" an officer. The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. (footnotes omitted)

We are of the opinion, that as in *Houston*, Section 260(a) "confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in 'one-on-one' situations where the only witnesses are the arresting officer and the person charged."[7] *Houston v. Hill*, 482 U.S., at 466; 96 L. Ed. 2d at

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[7] S.W. Gard, *Fighting Words As Free Speech*, 58 Wash. U.L.Q. 531 (1980) ("The reported cases demonstrate that the fighting words doctrine is seldom, if ever, used for its intended purpose. Instead, it is almost uniformly invoked in a selective and discriminatory manner by law enforcement officials to punish trivial violations of a constitutionally impermissible interest in preventing criticism of official conduct. Under these circumstances, it is important to recognize that the doctrine is, at best, a quaint remnant of a bygone morality". At page 580).

415. See also *Kolender v. Lawson*, 461 U.S. 360-361; 75 L. Ed. 2d 903, 910-911; 103 S. Ct. 1855 (1983); *Smith v. Goguen*, 415 U.S. 566, 575; 39 L. Ed. 2d 605, 613; 94 S. Ct. 1242 (1974); *Colten v. Kentucky*, 407 U.S. 104; 32 L. Ed. 2d 584; 92 S. Ct. 1953 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156; 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972); *Coates v. Cincinnati*, 402 U.S. 611, 615-616; 29 L. Ed. 2d 214, 218-219; 91 S. Ct. 1686 (1971); *Gregory v. Chicago*, 394 U.S. 111, 120; 22 L. Ed. 2d 134, 141; 89 S. Ct. 946 (1969).

In 1981-82, Puerto Rico police arrested **5,254 persons**[8] for violation of the breach-of-peace statute. And in 1989-90 the figure increased to **9,644 cases**[9] for violating such statute. Therefore we can certainly say that the statute at issue is often applied in the Commonwealth of Puerto Rico.

In conclusion Section 260(a) gathers all the elements necessary to be attacked, on its face: it regulates protected speech and conduct. It is not limited to fighting words; it

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T.F. Shea, *"Don't Bother to Smile When You Call Me That" – Fighting Words and The First Amendment*, 63 Ky. L.J.1 (1975) ("[A] majority of the United States Supreme Court has gradually concluded that fighting words, no matter how narrowly defined, are a protected form of speech and that as a result a mere rational basis is no longer sufficient to justify legislation". Id., pages 1-2).

[8] R. Emmanuelli Jiménez, *Análisis Constitutional del Delito de Alteración a la Paz Artículo 260 del Código Penal de Puerto Rico*, ("Constitutional Analysis of the Puerto Rico Breach-of-Peace Statute, Section 260 of the Puerto Rico Penal Code") 55 Rev. Jur. U.P.R. 587 (1986).

[9] Figures obtained from *1989-90 Annual Reports of the Judicial Branch of Puerto Rico.*

is an overbroad and vague statute; and it delegates too much discretion to law enforcement officials, policemen, prosecutors and judges as for what constitutes breach of peace.

The Puerto Rico Supreme Court refuses the consideration of these important federal questions of First Amendment, solely because they were not raised at trial. We believe that the court should have considered these issues of overbreadth and vagueness and also the question of the unconstitutionality of the jury instruction, that were presented for the first time on appeal. The "rule of the Stromberg case", was applicable to this one. So a person may challenge a general-verdict conviction on the ground of unconstitutionality, whether or not was raised at trial. *Griffin v. United States*, 502 U.S. ___; 116 L. Ed. 2d 371, 380 (1991); *Bachellar v. Maryland*, 397 U.S. 564, 569, 570-571, 25 L. Ed. 2d 570, 90 S. Ct. 1312 (1970); *Terminiello v. Chicago*, 377 U.S. 1, 5; 93 L. Ed. 1131; 69 S. Ct. 894 (1949).

On page 9 of its *Judgment* of November 10, 1995, App. 10, the Puerto Rico Supreme Court held, about the error of the constitutionality of the jury instructions, that this assignment of error lacked merit and is untenable. We believe respectfully, that petitioner raised a very important issue of abridgement of fundamental rights under the First and Fourteenth Amendments, to the United States Constitution as well as issues under the Constitution of the Commonwealth of Puerto Rico and the court should have considered them. This is ever more true because petitioner was attacking such Section 260(a) because of overbreadth and vagueness. And "the transcendent value to all society of constitutionally protected expression is justified allowing 'attacks on overly broad

statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the narrow specificity.' " *Lewis v. City of New Orleans*, 415 U.S. 130, 133-134; 39 L. Ed. 2d 214, 219; 94 S. Ct. 970 (1974); *Gooding v. Wilson*, 405 U.S. 518, 521; 31 L. Ed. 2d 408, 413; 92 S. Ct. 1103, supra.

II. This case involves a fundamental question of First Admendment construction which the Puerto Rico Supreme Court has decided in conflict with all decisions of this Court about "fighting words" and abridges the freedom of speech of all persons in the Commonwealth of Puerto Rico.

Section 260(a) of Puerto Rico Penal Code, as construed by the local Supreme Court, is still unconstitutional, vague and overbroad. Although the court had the opportunity to narrowly limit the breach-of-peace statute to fighting words, those which by their very utterance tend to incite an inmediate breach of peace, the court did not do so. This Court has repeatedly held that when a state Supreme Court confronts similar statutes, construction must be limited to the same words that 'have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.' And in *Gooding v. Wilson*, supra, at 522; 31 L. Ed. 2d 408, 414; it was stated that breach-of-peace " . . . statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' "

The Puerto Rico Supreme Court had the opportunity to narrowly limit such Section 260(a) to an acceptable constitutional construction in the leading case of *People v. Caro González*, 110 P.R.R. 669 (1980), but the court failed to do so. The court established that "the police is entitled to the same protection given to other persons." Id., at page 680. The court added, at page 681:

> In the face of this dilemma, we resolved that the application of modality (a) of art. 260 of the Penal Code, exactly as it has been construed, is not totally excluded when the subject is a policeman. However, among all the circumstances which should be considered for the crucial determination of whether the words constitute "fighting words", attention must be paid to the fact that one should always expect that a policeman exercise a greater degree of control over his emotions, showing a high degree of tolerance when faced with possible insults that may be addressed to him in diverse situations.

So the holding of the case, *People v. Caro González*, supra; was merely that a police officer is entitled to a same legal protection as any other citizen from public insults. Puerto Rico Supreme Court concluded that the words said by defendant Caro González qualified as fighting words. It was stated: "The words uttered within the meaning attibuted to them by the general idiosyncracy of our people, are by their own nature, rather than annoying, offensive, and irritating, capable of provoking a violent reaction (fighting) and consequently a breach of peace. Only the policeman's self-control prevented that the insults degenerated into a violent situation." *People v. Caro González*, supra, at page 682. We differ

of this analysis. **First,** the court is saying *a priori* that said words ("The police may go to hell, you bastards.") are fighting words without taking in account the facts[10] and the precedent cases of this Court. The expression ("you son of a bitch, I'll choke you to death.") in *Gooding v. Wilson,* 405 U.S., supra, or in *Lewis v. City of New Orleans* (you god damn m. f. police), 415 U.S., supra, or in *Hess v. Indiana,* 414 U.S. 105, 107; 38 L. Ed. 2d 303, 306; 94 S. Ct. 326 (1973), ("[w]e'll take the fucking street later, or [w]e'll take the fucking street again . . . "), we believe are stronger than those in *Caro González.*[11] **And second** but more importantly Puerto Rico Supreme Court[12] did not refine or narrowly limit Section 260(a) of the Puerto Rico Penal Code to "those words which by their very utterance inflict injury or tend to incite an immediate breach of

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[10] Examining those facts, appear that the police officer had 19 years of service, there was no physical contact with the policemen, they could not get into the house and appellant did not leave the same. *People v. Caro González,* supra, at 670.

[11] It seem to be that in *González Caro,* the court forgot that there was a police officer involved. And this is a big difference. Justice Powell noted in Lewis I: "If these words had been addressed by one citizen to another, face to face and in a hostile manner, I would have no doubt that they would be 'fighting words'. But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen". *Lewis v. City of New Orleans,* No. 79-5323; 408 U.S. 913 L. Ed. 2d 321; 92 S. Ct. 2499 (1972).

[12] It is interesting that in the case of *Caro González,* supra, at 676-677, were cited important cases of this Court, such as, *Gooding, Lewis, Chaplinsky and Rosenfeld,* but the court did not limited authoratatively the language of Section 260(a) to fighting words.

peace." *Lewis v. City of New Orleans*, 415 U.S., supra, at 132; 39 L. Ed. 2d 218, *Gooding v. Wilson*, 405 U.S., supra, at 522; 31 L. Ed. 2d 408.

In the instant case, as in *Caro González*, the Supreme Court of the Commonwealth of Puerto Rico, classified the language used by the defendant petitioner Díaz Matos as "fighting words", without applying the "fighting words doctrine of today."[13] This doctrine is a four step test established by this Court through all of its decisions to determine whether or not an expression constitutes "fighting words".[14] The "four elements must be present before the doctrine will deprive a message of constitutional protection".[15] These elements are:[16]

> First, the utterance must constitute an extremely provocative personal insult [or a personally abusive epithet],[17] a factor requiring a judicial analysis of the content of the expression. Second, the words must have a direct tendency to cause an immediate response by the average recipient. Third, the words must be uttered face-to-face to the addressee. Fourth, the utterance must be directed to an individual, not a group.

The court in the instant case did not apply this standard and concluded that the language involved was fighting words. This determination is in conflict with all

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[13] See S.W. Gard, *Fighting Words As Free Speech*, 58 Wash. U.L.Q. 531 (1980).

[14] Id. at p. 536.

[15] Id.

[16] Id. at p. 550.

[17] Id. at p. 537.

decisions of this Court and also abridges the freedom of speech of all persons of the Commonwealth of Puerto Rico. On the other hand, there are some opinions of the Puerto Rico Supreme Court that are in contradiction with the case at bar and with *Caro González*, supra. The expression used by the petitioner was: "you are a son of a bitch." (or "cuckold" the word in spanish was *"cabrón"*). However, in *People v. Ortíz González*, 111 P.R.R. 503, 513 (1981), the court enunciated:

> The great provocation mentioned by the appellant in his brief to justify the killing of the deceased is that the latter told him: "Look you, cuckold (*cabrón*), you want to rob me of my old lady's inheritance". Appellant argues that "said words said in Puerto Rico to a married man . . . are greatly provocative and it is one of the most serious offenses which can be uttered". (Brief, p. 19.) This is not true. **There are even worse offenses,** and this notwithstanding, does not justify that the aggrieved starts shooting at the loudmouthed.(n1)
>
> ---
>
> (n1) It is interesting to point out that the evidence for the prosecution charges appellant with having called the victim "cuckold" (*cabrón*) in an incident which took place on March 16 and which culminated in the tragedy of the 21st. (emphasis added)

Later in *Negrón v. Orozco Rivera*, 113 P.R.R. 921, 926 (1983), n3, *"cabrón"* was said to a policeman and nothing happened at the moment. Several days later the police officer shot to death the person who called him *"cabrón"*. The incidents related to the shooting were totally

independent from the time that decedent uttered *"cabrón"*. In anyway, we have to distinguish the facts of this case; here the individuals were involved in an active dispute and police officer participant of this facts was not performing any kind of official functions. Therefore, the "fighting words doctrine mandates a sensitive analysis of the circumstances in which the words are uttered, and an appreciation of the distinction between arousal of anger or outrage in the recipient of the language and creation of an uncontrollable reflexive and violent response."[18]

On the other hand, *Terminiello* imposes "requirement that the words must create a likelihood of an immediate, violent, reflexive response by the recipient as a meaningful element of the fighting words doctrine."[19] And, by the same token:

> It is not sufficient that the addressee might feel anger or outrage. Only when the addressee experiences an uncontrollable violent impulse will the fighting words doctrine declare the speech unprotected by the first amendment. In addition, the Court clearly established that it would no longer indulge in the simplistic assumption that certain words inevitably provoke such a reaction. Instead, the likelihood of an immediate violent reaction becomes a factual

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[18] Id. at 549. Gard, added at 553: "Thus, the question of whether the offending language constitutes unprotected fighting words requires an analysis not only of the words themselves, but also of several other facts 'such as the relation of the parties, the circumstances under which the language was used, and the manner of the speaker' ".

[19] Id.

> inquiry largely dependent on the circumstances surrounding the use of the offensive language.[20]

It is important to say that this Court in the recent case of *R.A.V. v. St. Paul*, 505 U.S. ___, 120 L. Ed. 2d 305, 318-320 (1992), acknowledged that also certain language that could qualify as "fighting words" is protected by the Constitution:

> It is not true that 'fighting words' have at most a 'de minimis' expressive content, ibid., or that their content is *in all respects* 'worthless and undeserving of constitutional protection'. post, at ___, 120 L. Ed. 2d at 330; sometimes they are quite expressive indeed. We have not said that they constitute 'no part of the expression of ideas', but only that they constitute 'no *essential* part of any exposition of ideas'. Chaplinsky, 315 U.S., at 572, 86 L. Ed. 1031, 62 S. Ct. 766 (emphasis added).
>
> The proposition that a particular instance of speech can be proscribable or the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

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[20] Id. at 550.

Finally, the conviction of petitioner must be set aside because is based on a clearly wrong jury instruction that was framed on a language of such unconstitutional breach-of-peace statute. And as we said before, the Puerto Rico Supreme Court should have applied to the case here "the rule of the Stromberg case", so a person may challenge a general-verdict conviction on an unconstitutional ground, for the first time on appeal. *Griffin v. United States*, 502 U.S. ___; 116 L. Ed. 2d 371, 380 (1991). See also *Bachellar v. Maryland*, 397 U.S. 564, 569, 570-571, 25 L. Ed. 2d 570, 90 S. Ct. 1312 (1970); *Terminiello v. Chicago*, 377 U.S. 1, 5, 93 L. Ed. 1131, 69 S. Ct. 894 (1949).

The instruction questioned here was the following:

> Another charge made by the prosecution is that of section 260, better known as Breach of the Peace. This section also has three modalities, and of course, the charge made against the defendant relates to one of these modalities, and section 260, which covers this situation, states that: "Breach of the Peace is committed by any person who willfully performs any of the following acts," and three acts are mentioned, but only one is applicable to him, and that is subsection A, and subsection A states the following: "Disturbs the peace or quiet of any individual or neighborhood, by loud and unusual noises, tumultuous or offensive conduct or threats, insults, fights, challenges or provocations". (See App. 11)

When we evaluate this jury instruction, we can see that this one is unconstitutional and fails to conform with the requirement set forth in *Terminello v. Chicago*, 337 U.S. 1, 93 L. Ed. 1131, supra. This instruction gathers only the

unconstitutional language of Section 260(a), nothing more.

CONCLUSION

We have to ask ourself why this Court should issue a Writ of Certiorari to review the judgment that the Puerto Rico Supreme Court issued on the instant case? There are two paramount reasons. First, the unconstitutional Section 260(a) is continuing and consistently been applied to the whole citizens of Puerto Rico creating a serious chilling effect on the freedom of speech over the entire population. And secondly, at least from 1921,[21] the Puerto Rico Supreme Court has not construed Section 260(a) to be applied only to "fighting words", hence consistently prohibited expressions protected by the First Amendment.

Respectfully submitted,

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[21] See *People v. Ways*, 29 P.R.R. 311 (1921); *People v. Ruiz*, 29 P.R.R. 68 (1921); *People v. Pillot*, 29 P.R.R. 826 (1921); *Vizcarra Castellón v. People*, 92 P.R.R. 150 (1965); *People v. Caro González*, 110 P.R.R., supra.

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

The People of Puerto Rico, Appellee	Appeal from the Superior Court, San Juan Part
v.	
Carlos Díaz Matos, Defendant and appellant	No. CR-93-109 Breach of the Peace (Sec. 260 P.C.)

JUDGMENT

San Juan, Puerto Rico, November 10, 1995

Appellant Carlos Díaz Matos was accused in the Superior Court of Puerto Rico, San Juan Part, of violating sec. 2.8 of the Domestic Violence Act (Act 54)[1], of breach of the peace[2], use of violence and intimidation against public authority[3], and aggravated battery[4] for events that allegedly took place on August 17, 1991, at the Hato Rey East Police Station.

A jury trial was held. The trial judge peremptorily acquitted the defendant of the Act 54 charge. The jury acquitted him of the offenses of violence and intimidation against public authority and aggravated battery, but found him guilty of breach of the peace. On April 27,

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[1] Act No. 54 of August 15, 1989 (8 L.P.R.A. § 628).

[2] Puerto Rico Penal Code sec. 260 (33 L.P.R.A. § 4521).

[3] Puerto Rico Penal Code sec. 256 (33 L.P.R.A. § 4491).

[4] Puerto Rico Penal Code sec. 95 (33 L.P.R.A. § 4032).

1993, Díaz Matos was sentenced to pay a $250 fine plus the costs or to serve one day in jail for every $5 left unpaid.

The defendant appealed to this Court essentially alleging that the evidence brought against him was not sufficient at law to establish his guilt beyond a reasonable doubt. In his brief, he also alleged that the breach of the peace statute suffers from serious constitutional problems, and he questioned the instructions given to the jury. The solicitor general also appeared by brief.

After a careful examination of the record and of the parties' briefs – with special attention to the narrative statement – we are of the opinion that the alleged errors were not committed. We affirm the judgment of the trial court.

I

The contentions of unconstitutionality of the statute and of flawed instructions were not raised before the trial court. We must determine, then, if review of these points on appeal for the first time is warranted. However, we will first pass upon the allegation of insufficiency of the evidence, for if the appellant prevails here, subsequent discussion of the remaining two errors will not be necessary.

According to the amended narrative statement, the following witnesses testified for the prosecution: Raquel Rosado Osorio, the defendant's ex-wife; the injured party, police officer Juan Rosa Rodríguez; and sergeant Rafael

Díaz, who investigated the complaint. Insofar as it is pertinent, they expressed the following.

Rosado Osorio testified that following an argument between her oldest daughter and the defendant, she went to the Investigations Division of the Judicial Center in Hato Rey around 1:00 a.m. on August 17, 1991, to file a complaint against her ex-husband. Upon leaving, she ran into officer Rosa. While the police officer was giving her some advice, her ex-husband arrived. Officer Rosa cited them for that same day at 6:00 p.m. She went home, and the defendant remained there with their minor son. At approximately 2:00 a.m., Diaz Matos took his son to her house and left. She stated that the defendant did not use obscene language that night. She further testified that she found out about what had happened between her ex-husband and police officer Rosa when, responding to the citation, she appeared at the Hato Rey east Police Station that day during the evening.

On cross examination, she testified that on the night of the events, the defendant did not enter her house, and it came out that in her sworn statement, she had made no reference to insulting words by the defendant.

Police officer Rosa Rodriguez testified that on the day of the events, he was working the 6:00 p.m. to 2:00 a.m. shift. He stated that at 2:00 a.m., he was at the Investigations Division of the Judicial Center in Hato Rey filing another case when a lady arrived and asked him for help stating that her husband was upsetting her. At this moment, the defendant arrived and asked Rosa to help him. Rosa stated that he then cited them for that same

day during the evening at the Hato Rey East Police Station.

He further testified that he went to the above-mentioned police station and that when he arrived, he noticed that Díaz Matos had also arrived there. The defendant told Rosa that he was going to report him to the on-duty sergeant. Immediately, Rosa prepared an official citation and asked the defendant to sign it; the latter refused, turned around, and headed for the station door. Rosa followed him with the intention of handing him the citation, when Díaz Matos "turned around, grabbed and crumpled the citation, and called him *cabrón*,"[*] and then slapped him in the face. He emphasized that he felt offended by this word because he is a married man. He stated that police officers Cordero and Torres were present at that moment. Lastly, Rosa testified that he needed the assistance of another officer to arrest Díaz Matos and that he later told sergeant Díaz what had happened.

On cross examination, he indicated that he did not know why the prosecution had not included as witnesses or summonsed the other police officers who allegedly had seen the events.

The last witness was sergeant Díaz. He testified that police officer Rosa had informed him of what had taken place and that he did not include the other officers as witnesses because he did not deem it necessary. On cross examination, he clarified that he had not seen the incident at the police station.

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*[Translator's note: This word may be translated as either "cuckold" or "son of a bitch."]

At the end of the trial, the jury found Carlos Díaz Matos guilty of breach of the peace.

II

Regarding breach of the peace, Penal Code sec. 260(a) provides:

> It shall be punishable by imprisonment not exceeding six (6) months or a fine not exceeding five hundred dollars, or both, in the discretion of the court for any person who willfully performs any of the following acts:
>
> (a) Disturbs the peace or quiet of any individual or neighborhood, by loud and unusual noises, tumultuous or offensive conduct or threats, insults, fights, challenges or provocations.

On various occasions we have examined and construed subsection (a) of this statute, and we have established that the punishable conduct refers to maliciously and willfully disturbing "the peace or tranquility of any community or individual by (a) loud or unusual noise; (b) tumultuous or offensive conduct . . . ; (c) threatening; (d) traducing; (e) quarreling; (f) challenging to fight; or (g) fighting." *Pueblo v. Caro González*, 110 D.P.R. 518, 521 (1980). Under the modality that concerns us, it is not necessary to prove that the act was seen by persons other than the one directly affected or that it occasioned such commotion or disorder as would stir the general tranquility of a sizeable segment of the community. *Vizcarra Castellón v. People*, 92 P.R.R. 150, 161 (1965). We reaffirm today that by protecting the interests of the individual, we are also protecting the public's interests. Nor is it

necessary to prove an actual disturbance of the peace *or even an intention to breach the peace. Id.* at 161. The sole conduct of addressing insults at another is punishable under sec. 260(a), "there being no need to go into such considerations as: whether in effect, it caused violence . . . or if the conduct could have probably caused said results." *Caro González,* 110 D.P.R. at 523-24. Furthermore, regarding the particular circumstances of this case, already in *Caro González* we recognized that an average citizen can commit the offense of breach of the peace by uttering insults and offensive words to a police officer. We held then that the police officer was worthy of the same protection enjoyed by other citizens against undue interferences with his peace and tranquility, on the sole basis of his condition as a human being.[5]

Challenging the sufficiency of the evidence, Díaz Matos alleges that "serious and essential contradictions" arise from the testimony of police officer Rosa Rodríguez and so justify the reversal of the conviction, especially since he was the only witness to testify about the facts. Appellant states that officer Rosa admitted to having changed the date of a medical certificate which indicated that he had an internal laceration in his mouth, and denied having received medical attention on the day of the events. He further argues that this same witness contradicted himself, initially claiming that a breach of

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[5] In *Caro González,* we arrived at said conclusion even though we recognized that a greater degree of emotional control should be expected from a police officer and that a police officer should have a greater degree of tolerance toward possible confrontations to which he may be subject in different situations.

the peace was committed because the appellant uttered words in the presence of women and children, which he later denied.

The problem with this argument is that appellant is not aware of the fact that the evidence regarding the medical certificate did not seek to prove breach of the peace, but rather aggravated battery, of which offense, as we mentioned earlier, the defendant was acquitted.

Likewise, appellant's contention that the words were not uttered in the presence of women and children is also inconsequential. For subsection (a) breach of the peace to exist, there is no need to prove that the phrases were uttered in the presence, or within the hearing range, of women or children, or that these phrases were said in a loud or boisterous manner.[6] *Vizcarra Castellón v. People*, 92 P.R.R. 150 (1965); *Pueblo v. Caro González*, 110 D.P.R. 518 (1980).

The facts described show that the evidence presented by the prosecution – if believed, as it was – covers all of the elements of the offense charged and links the defendant to the events of which he was accused. As we well know, since trial courts are in a better position to weigh oral evidence, the findings of the trier below deserve the deference of the appellate courts. *Pueblo v. Miranda Ortiz*, 117 D.P.R. 188, 191 (1986); *Pueblo v. Pagán Díaz*, 111 D.P.R. 608, 621 (1981). As for the breach of the peace offense in the case at bar, the jury believed officer Rosa's version of

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[6] This modality of breach of the peace falls under subsection (c). Puerto Rico Penal Code sec. 260(c), 33 L.P.R.A. § 4521(c).

the facts. We cannot conclude that this finding was erred. Direct evidence from a sole witness who deserves full credit is sufficient proof of any fact (Rule 10(D) of the Rules of evidence, 32 L.P.R.A. App. IV). It shall suffice that police officer Rosa stated that the defendant shouted the word "*cab---*" at him in the circumstances described, that he felt very offended, and that the jury believed him. Absent any indication of passion, prejudice, bias, or manifest error, we shall not disturb the weighing of the evidence made by the trier of fact. *Pueblo v. Chévere Heredia*, 95 J.T.S. 115, 141 D.P.R. ___ (1995); *Pueblo v. Rodríguez Román*, 91 J.T.S. 26, 128 D.P.R. ___ (1991).

III

Appellant argues that the breach of the peace statute "is unconstitutional and void on its face for reasons of overbreadth and vagueness," since, in his opinion, it does not provide an adequate warning as to what it is meant to prohibit. He argues that the conduct and actions that said statute regulates "are so general and lacking in specificity that they confuse and disorient." He further adds that the statute in question infringes on the right to freedom of expression, inasmuch as offensive language is constitutionally protected and cannot be subject to criminal action.

Appellant also contends that the offense of breach of the peace was not committed because there was no criminal intent in his act. His intention was not to insult or denigrate the police officer to whom he addressed that word, but rather said expression was more of a reaction of irritation and anger on his part. He argues that this is

evidenced by the fact that he did not know that officer Rosa was married.

Lastly, Díaz Matos points out that the word in question "does not constitute *per se* a fighting word" since it is his understanding that in Puerto Rico, to merely say that word to another person is not in itself "a highly inflammatory personal insult."

These assignments of error were not alleged nor raised by the appellant before the trial court. It is well known that when an error is raised for the first time on appeal, the same should not prosper, *Rivera Rivera v. Delgado, Warden*, 99 P.R.R. 78, 81 (1970); *People v. Del Valle*, 91 P.R.R. 167, 172 (1964), unless it deals with fundamental errors arising from the record, *People v. Torres Rosario*, 89 P.R.R. 142, 145 (1963); 34 L.P.R.A. § 1171. In order for us to consider these assignments of error, the appellant would have to reveal exceptional circumstances, which do not arise from the record and which were not brought to our attention by appellant. *People v. Soto Zaragoza*, 99 P.R.R. 739, 745 (1971). Much to the contrary, the appellant's constitutional arguments are trite and meritless.

We have previously held that it is legitimate to intervene with the expression or language of a citizen when there exists an authentic interest in safeguarding the public order; this interest is paramount when fighting words are involved. We have also held that there is no hermeneutic consideration whatsoever that prevents an interpretation to the effect that the statute in question prohibits precisely the type of language used by Díaz Matos. *Pueblo v. Caro González*, 110 D.P.R. 518 (1980). The

errors assigned did not infringe on the appellant's fundamental rights, and hence, discussion of the same for the first time on appeal is not warranted.

IV

In the last assignment of error, appellant challenges the constitutionality of the instructions given to the jury. He contends that said instructions should have informed the jury that the expression uttered by the defendant "must have tended to provoke the listener into an immediately violent reaction." He further contends that the Manual of Instructions to the Jury contains no instruction at all regarding the offense of breach of the peace.

This assignment lacks merit and is untenable. Rule 137 of the Rules of Criminal Procedure, 34 L.P.R.A. App. II, provides, insofar as it is pertinent, that:

> Neither party may assign as error any portion of the instructions or omission therein unless objection is raised thereto or additional instructions are requested before the jury retires to deliberate, stating clearly the grounds of challenge or of its request.

Only if the instructions that the court actually gave the members of the jury, or those that it failed to give, "infringe on the appellant's fundamental rights," can the latter raise this as an error on appeal despite not having opportunely objected to said instructions. *Pueblo v. Ortiz Martínez*, 116 D.P.R. 139 (1985); *Pueblo v. Rivera Carmona*, 108 D.P.R. 866 (1979); *People v. Alicea Cruz*, 100 P.R.R. 294 (1971); *People v. López Jiménez*, 96 P.R.R. 129 (1968).

The trial judge gave the following instructions with regard to the offense of breach of the peace.

> Another charge made by the prosecution is that of section 260, better known as Breach of the Peace. This section also has three modalities, and of course, the charge made against the defendant relates to one of these modalities, and section 260, which covers this situation, states that: "Breach of the Peace is committed by any person who willfully performs any of the following acts," and three acts are mentioned, but only one is applicable to him, and that is subsection A, and subsection A states the following: "Disturbs the peace or quiet of any individual or neighborhood, by loud and unusual noises, tumultuous or offensive conduct or threats, insults, fights, challenges or provocations."

The judge then warned that in order to arrive at a conviction, the evidence had to establish the guilt of the defendant beyond a reasonable doubt.

The judge thereafter asked the parties if they had any additional instructions they wanted to include, and they answered that they did not. Also, since the defendant was charged with subsection (a) of the offense in question, the judge read only said subsection. Nevertheless, he also asked the parties if they wanted all of the subsections read, and both parties said no. On more than one occasion, the trial judge gave the parties the opportunity to object or add something to the instructions given. The defense not only made no objection to said instructions, but agreed with the same for the record. A careful and unbiased analysis of the instructions that the trial court

actually gave to the members of the jury in this case[7] – in light of the evidence presented – convinces us that said instructions substantially conform to law insofar as they explained to the jury all the legal aspects pertinent to the case. The instructions did not omit any essential element of the offense. Thus, we hold that the appellant's "fundamental rights" were not impaired, and consequently, the error alleged was not committed.

For the foregoing reasons, the judgment appealed is affirmed.

It was so decreed and ordered by the Court and certified by the Chief Clerk. Justice Hernández Denton dissents without an opinion. Justice Rebollo López took no part in this decision.

Francisco R. Agrait Lladó
Chief Clerk

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[7] A transcript of these instructions is included in the record.

Commonwealth of Puerto Rico

Supreme Court

Office of the Clerk

Bureau of Translations

P.O. Box 2392

San Juan, Puerto Rico 00902-2392

CERTIFICATE OF TRANSLATION

This is to certify that the attached translation of the *Judgment rendered by the Supreme Court of Puerto Rico, on November 10, 1995, in case No. CR-93-109, The People of Puerto Rico v. Carlos Díaz Matos (Breach of the peace, sec. 260 P.C.)*, made by the Bureau of Translations of the Supreme Court of Puerto Rico, is an accurate rendition into the English language of the original Spanish.

/s/ Olga A. Lasa Delgado
Olga A. Lasa Delgado
Director
Bureau of Translations
Supreme Court of Puerto Rico

CERTIFICATE OF THE CHIEF CLERK

I, Francisco R. Agrait-Lladó, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation of the *Judgment rendered by the Supreme Court of Puerto Rico, on November 10, 1995, in case No. CR-93-109, The People of Puerto Rico v. Carlos Díaz Matos (Breach of the peace, sec. 260 P.C.)*, made by the Bureau of Translations of this Court under the authority of Act No. 87 of May 31,

1972, from the original Spanish that is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the Society for Legal Assistance of Puerto Rico, I issue these presents for official use, fee-free, under my hand and the seal of this Court in San Juan, Puerto Rico, this 7th day of February, 1996.

/s/ Francisco R. Agrait-Lladó
Chief Clerk
Supreme Court of Puerto Rico
[SEAL]

Commonwealth of Puerto Rico

Supreme Court

Office of the Clerk

Bureau of Translations

P.O. Box 2392

San Juan, Puerto Rico 00902-2392

CERTIFICATE OF TRANSLATION

This is to certify that the attached translation of the *Notice issued by this Court on November 13, 1995, in case No. CR-93-0109, The People of Puerto Rico v. Díaz Matos, Carlos,* made by the Bureau of Translations of the Supreme Court of Puerto Rico, is an accurate rendition into the English language of the original Spanish.

/s/ Olga A. Lasa Delgado
Olga A. Lasa Delgado
Director
Bureau of Translations
Supreme Court of Puerto Rico

CERTIFICATE OF THE CHIEF CLERK

I, Francisco R. Agrait-Lladó, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation of the *Notice issued by this Court on November 13, 1995, in case No. CR-93-0109, The People of Puerto Rico v. Díaz Matos, Carlos,* made by the Bureau of Translations of this Court under the authority of Act No. 87 of May 31, 1972, from the original Spanish that is under my custody in this office.

IN WITNESS WHEREOF, at the request of the Society for Legal Assistance of Puerto Rico, I issue these presents for official use, fee-free, under my hand and the seal of this Court in San Juan, Puerto Rico, this 9th day of February, 1996.

/s/ Francisco R. Agrait-Lladó
Chief Clerk
Supreme Court of Puerto Rico
[SEAL]

(Translation)

COMMONWEALTH OF PUERTO RICO
GENERAL COURT OF JUSTICE
SUPREME COURT

THE PEOPLE OF PUERTO RICO PETITIONER

v.

DIAZ MATOS, CARLOS RESPONDENT

CASE: CR-93-0109 Crim. Case No. KOP91M010
Criminal Appeals

Civil Action or Offense

PEREZ BONILLA, LUIS ALICIA
APARTADO 20593
RIO PIEDRAS, P.R. 00928

NOTICE

I Certify that with regard to the Notice of Appeal, the Court issued the Judgment enclosed.

Hon. Solicitor General – San Joan, PR 00902

Fairinacci García, Roberto – Ave. Hostos 846 (altos) – Hyde Park – Rio Piedras

San Juan, Puerto Rico, this 13th day of November, 1995.

FRANCISCO R. AGRAIT LLADO
CHIEF CLERK

(Sgd.) /s/ Jorge Maldonado
ASSISTANT CLERK
[SEAL]